Supreme Court, U.S.
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Case No._____

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1994

ROBERT A. AMATO,
Petitioner,
vs.
THE OFFICE OF THE LOUISIANA COMMISSIONER OF SECURITIES, BRIDGER EGLIN IN HIS CAPACITY AS COMMISSIONER OF SECURITIES, AND HARRY C. STANSBURY IN HIS CAPACITY AS DEPUTY SECURITIES COMMISSIONER
Respondent.

Petition for a Writ of Certiorari to the Louisiana Supreme Court

Petition for a Writ of Certiorari

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QUESTIONS PRESENTED FOR REVIEW

I. Whether a State Securities Deputy Commissioner who regulates the licensure of stockbrokers can be granted absolute judicial immunity from civil liability when the Deputy denies a stockbroker a license through depriving the stockbroker due process of law resulting from the failure of the State through the Deputy Commissioner to promulgate legislatively required rules and regulations, and thereby allowing the Deputy to act in a completely arbitrary manner?

II. Whether the doctrine of qualified immunity applies to the administrative acts of a state securities deputy commissioner who completely denied a stockbroker due process of law through the deputy's continuous seventeen year failure to administrate his solely delegated, non-discretionary responsibilities of promulgating rules and regulations under the State Administrative Procedures Act?

III. Whether a State can take advantage of Federal District Court abstention, and assert immunity, when said abstention, in part, was contingent upon the State's waiver of immunity?

PARTIES TO THE PROCEEDINGS IN THIS COURT

Robert A. Amato, *Pro Se* is the Petitioner in this court. The Office of the Louisiana Commissioner of Securities, Fred Dent, Larry Murray, Bridger Eglin in their capacity as Commissioner of Securities, and Harry C. Stansbury in his capacity as Deputy Securities Commissioner.

TABLE OF CONTENTS

Page

Questions Presented for Review i

List of Parties to the Proceedings of this Court ii

Table of Authorities iv

Opinions Below 1

Statement of Jurisdiction 2

Constitutional Provisions 2

Statement of the Case 4

Reasons for Granting the Petition 6

Conclusion 15

(A)ppendix:.....16

A. Decision, Louisiana Fourth Circuit Court of Appeals..... A-1

B. Decision, Louisiana Supreme Court..... A-21

C. Opinion, U.S. District Court Eastern District of Louisiana..... A-22

D. Additional Statutory Provisions..... A-29

1. Federal Statute

a. 42 U.S.C. § 1983..... A-29

2. Louisiana State Statutes..... A-29

a.La. R.S. 6:101.....A-29

b.La. R.S. 9:2798.1..... A-30

c. La. R.S. 51:710..... A-31

TABLE OF AUTHORITIES CITED

UNITED STATES SUPREME COURT CASES

Pages

Forrester v. White, 484 U.S. 29,
108 S. Ct. 219, 98 L. Ed. 2d 555 (1988).....10, 14

Harlow v. Fitzgerald, 457 U.S. 800,
102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)..... 14

Pulliam v. Allen, 466 U.S. 522,
104 S. Ct. 1970, 80 L. Ed. 2d 565 (1984).....10

LOUISIANA SUPREME COURT CASES

Chamberlain v. State DOTD,
624 So. 2d 874 (La. 1993).....7

Morest v. Department of Wildlife and Fisheries,
567 So. 2d 1081 (La. 1990).....14,15

Rick v. State DOTD,
630 So. 2d 1271 (La. 1994).....10

UNITED STATES CONSTITUTION:

Amendment XIV, Section 1.....2, 7

FEDERAL STATUTES

42 U.S.C. § 1983.....4, 7, 10, A-29

LOUISIANA CONSTITUTION AND STATUTES

La. Const. Article 12 § 10 (1974).....2,5

La. R.S. 6:101.....4, 8, A-29

La. R.S. 6:102.....8

La. R.S. 9: 2798.1.....4, 7, A-30

La. R.S. 49:952(2)..... 3, 5, 9, 10, 14

La. R.S. 49:953.....9

La. R.S. 49:955.....9

La. R.S. 49:961(c).....14

La. R.S. 51:702(3).....3, 8

La. R.S. 51:710(D).....4, 8, 10, 14, A-31

La. R.S. 51:716(A).....11, 13, 14

La. R.S. 51:720.....4, 6, 7, 8, 9

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THE OFFICE OF THE LOUISIANA COMMISSIONER OF SECURITIES, BRIDGER EGLIN IN HIS CAPACITY AS COMMISSIONER OF SECURITIES, AND HARRY C. STANSBURY IN HIS CAPACITY AS DEPUTY SECURITIES COMMISSIONER
Respondent.

Petition for a Writ of Certiorari to the Louisiana Supreme Court

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Louisiana Supreme Court in this case.

OPINIONS BELOW

The Louisiana Fourth Circuit Court of Appeal opinion is reported at 644 So. 2d 412 (La. App. 4th Cir. 1994) cert. den. 649 So. 2d 410 (1995).

STATEMENT OF JURISDICTION

The Louisiana Supreme Court denied a writ of certiorari to the Louisiana Fourth Circuit Court of Appeal on February 3, 1995. This court has jurisdiction to review the judgment of the State Court pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution
Amendment XIV, Section 1.

> **Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Louisiana State Statutes:
La. Constitution Article XII § 10 (1974)

> Section 10. **(A) No Immunity in Contract and Tort.** Neither the state, a state agency, nor a political subdivision shall be immune from suit and liability in contract or for injury to person or property.
>
> **(B) Waiver in Other Suits.** The legislature may authorize other suits against the state, a state agency, or a political subdivision. A measure authorizing suit shall waive immunity from suit and liability.
>
> **(C) Procedure; Judgments.** The legislature shall provide a procedure for suits against the state, a

state agency, or a political subdivision. It shall provide for the effect of a judgment, but no public property or public funds shall be subject to seizure. No judgment against the state, a state agency, or a political subdivision shall be exigible, payable, or paid except form funds appropriated therefor by the legislature or by the political subdivision against which judgment is rendered.

La. R.S. 49:952

Each agency which engages in rulemaking shall:

(1) File with the Department of the State Register a description of its organization, stating the general course and method of its operations and the methods whereby the public may obtain information or make submissions or requests.

(2) Adopt rules of practice setting forth the nature and requirements of all formal and informal procedures available.

(3) Make available for public inspection all rules, preambles, responses to comments, and submissions and all other written statements of policy or interpretations formulated, adopted, or used by the agency in the discharge of its functions and publish an index of such rules, preambles, responses to comments, submissions, statements and interpretations on a regular basis.

(4) Make available for public inspection all final orders, decisions, and opinions.

La. R.S. 51:702(3)

As used in this Part, the term:

. . .

(3) "Commissioner" means the commissioner of financial institutions who is also the commissioner of securities.

La. R.S. 51:720

> For any action taken or any proceeding had under this Part or under color of law, the commissioner shall be immune from liability and suit to the same extent that any judge of any court of general jurisdiction in this state would be immune.

Appendix Reproduction

Federal Statute
42 U.S.C. § 1983

Louisiana State Statutes
La. R.S. 6:101
La. R.S. 9:2798.1
La. R.S. 51:710

STATEMENT OF THE CASE

This is a case in which a securities salesman was denied licensure for an extended period time through the actions of a Louisiana State Securities Deputy Commissioner who deprived the salesman due process of law. The illegal lengthy delay of the salesman's licensure caused by the Deputy Securities Commissioner had a catastrophic impact on the plaintiff's/appelant's livelihood by destroying his formerly large customer base. The plaintiff/appellant amended a petition seeking injunctive relief to seek damages under state law as well as federal law under 42 U.S.C. 1983. The plaintiff/appellant also filed a parallel petition seeking damages in Federal district court which had abstained in part, on the presumption that the State had waived any assertion of immunity. **(A-26)** The last court to hear this matter was the Louisiana Fourth Circuit Court of Appeal which correctly and unanimously concluded that the defendants violated the Louisiana Securities Law, and by doing so denied the plaintiff's/appelant's right to due process. Although Louisiana Constitution Article XII § 10(A) specifically abolishes immunity, this same court in a two to one decision, shielded the defendants from liability by extending to the defendants absolute judicial immunity and qualified immunity. A re-hearing was requested by the plaintiff/appellant to the Louisiana Fourth Circuit Court of Appeal and the Louisiana Supreme Court in order to argue

the constitutional issue of immunity which had never been raised in open court. Application for further review and hearing was denied by both of these State courts.

Robert A. Amato, plaintiff/appellant, is a stockbroker in the State of Louisiana, whose profession at all times relevant herein was regulated by the Office of the State Commissioner of Securities. In the fall of 1990, Amato's employer was going out of business and Amato was going to work for a different stock brokerage firm. A stockbroker's application for a new license or a transfer of a license must be filed through his employer firm. When Amato's employer filed his application to be licensed with the new firm, Stansbury, the Louisiana Deputy Commissioner of Securities, unilaterally made the new employer withdraw the application upon threat of the firm losing its own license. Stansbury wanted Amato to report a state investigation that neither Amato nor his new employer knew about.

This action constituted a denial of Amato's license without notice and a hearing required by the State security law statutes. Stansbury claimed that his actions were justified because he was following an informal procedure and not the state statutes. However, the State had never promulgated any internal rules or regulations as required by La. R.S. 49:952(2) governing both the formal and informal licensure of State securities brokers. Consequently, Mr. Amato was denied a transfer of his license for a substantial period of time without the opportunity for a hearing and in violation of his constitutional rights of due process.

Mr. Amato filed a Petition for Injunction Relief on March 10, 1991, in the Civil District court for the Parish of Orleans seeking injunctive relief against the office of the Louisiana Commissioner of Securities including the Commissioner and the civil service employee deputy commissioner, Harry Stansbury. Following the filing of that proceeding, Mr. Amato's license was issued, albeit without the necessity of a court order.

On November 27, 1991, Mr. Amato amended his injunctive petition to ask for damages for his loss of business, mental and physical distress and deprivation of his state and federal constitutional rights of due process. He was denied his license from December 19, 1990, until May 7, 1991, and claimed that being out of business as a stockbroker for that period of time had disastrous consequences by depleting his customer base. He also filed a complaint in Federal District Court for the Eastern District of Louisiana, Docket No. 91-4484 "G4". The Federal Court dismissed the action on the basis of abstention, specifically presuming the defendants waived the

privilege of immunity and Amato's constitutional rights would be protected. (A-26)

The case was tried in State Civil District Court on August 30, 31 and September 1 and 2, 1993. Judgment was rendered in favor of defendants on September 20, 1993, and this matter was timely appealed to the Louisiana Fourth Circuit Court of Appeal on the 30th day of September, 1993. The Court of Appeal affirmed the trial court on October 30, 1994, with one dissenting opinion and one concurring opinion. The Court of Appeal unanimously held that Mr. Amato had been deprived of his constitutional rights, however, the author and one concurring opinion held that the civil service employee deputy commissioner had the absolute immunity of the Commissioner of Securities in La. R.S. 51:720. Judge Steven R. Plotkin wrote a lengthy dissent and would deny both absolute immunity under the statute to this state employee and qualified immunity under the facts of this case.

Mr. Amato filed a petition for a rehearing in October 13, 1994. The Petition for Rehearing was refused on November 15, 1994. Judge Steven Plotkin voted to grant a rehearing and assigned additional written reasons. Robert A. Amato timely filed an Application for Writ of Certiorari and Review with the Louisiana State Supreme Court which was denied by a five to two vote margin on February 3, 1995.

REASONS FOR GRANTING THE PETITION

I.

The Louisiana Fourth Circuit Court of Appeal erred in granting a civil service State Securities Deputy Commissioner absolute judicial immunity from civil liability because the State, through the Deputy Commissioner, has never promulgated legislatively - required rules and regulations thus allowing the Deputy to deny a stockbroker a license in an arbitrary manner, and by doing so, further depriving that stockbroker due process of law.

Robert Amato was denied his license to practice his chosen profession as a stock broker. He was denied that right without the due process requirements of notice and a hearing. U.S. Constitution Amendment XIV, Section 1. He filed a civil action seeking damages under state law as well as federal law under 42 U.S.C. 1983. The State Court of Appeal unanimously agreed that Robert Amato was deprived of his constitutional rights to due process. He was not

awarded damages because the commissioner office was deemed to be absolutely immune from suit under a selectively legislated act in the State Securities Law. La. R.S. 51:720.

That statute provides immunity as follows:

> For any action taken or any proceeding had under this Part or under color of law, the commissioner shall be immune from liability and suit to the same extent that any judge of any court of general jurisdiction in this state would be immune.

As pointed out by the dissent in the State Fourth Circuit Court of Appeals, to allow absolute immunity to one small agency in the executive branch sets a dangerous precedent, especially to those citizens who must appear before the agency either as stock brokers or issuers of stock. Chamberlain v. State DOTD, 624 So.2d 874 (La. 1993) holds that the legislature cannot recreate sovereign immunity to conflict with Louisiana Constitution. Art. XII § 10(A) which abolishes immunity. The dissent in this case also notes several conflicts that La. R.S. 51:720 establishes with other agencies of the executive branch who can only utilize La. R.S. 9:2798.1. The latter is a qualified immunity statute.

In just reviewing the facts of this case, they present a very chilling effect on any regulated industry. Here is a person with absolute power to control one's licensure and livelihood, who can conduct secret investigations of a person for an unlimited period of time and who has no accountability to anyone. No one should have that power in the United States. To equate the stature of that office to that of the judiciary is a patently absurd legislative preference. The Office of the Commissioner of Securities can now act as the executive branch, the legislative branch, and the judicial branch with no accountability. Mr. Amato and any broker is confronted with a "Catch 22." The agency promulgated no rules to follow. Its employee violated Mr. Amato's constitutional rights because there were no internal rules, no notice and no due process hearing. Yet, the agency and its employees are absolutely immune from suit. Why have any rules? There are no consequences.

Even the defendants did not believe that the absolute immunity statute went beyond the actual Commissioner to the rank and file of the department.

La. R.S. 51:720 specifically only applies to "the commissioner." The Louisiana Securities Law defines "Commissioner" as follows:

> (3) "Commissioner" means the commissioner of financial institutions who is also the commissioner of securities. (La.R.S. 51:702(3)).

The commissioner of financial institutions is an appointee of the governor. La. R.S. 6:101. As verified by the defendant-appellee, Stansbury, Deputy Commissioners are civil service employees and subject to applicable civil service laws, rules and regulations. See also La. R.S. 6:102 A and B, La. R.S. 51:710(D). (TR: Vol. V, pg. 30)

La. R.S. 51:720 does not apply to Stansbury and the two Special Assistant Attorney Generals confirmed that interpretation in this case. The defendants all filed various exceptions in this case, including the immunity from suit set out in La. R.S. 51:720. That exception was only brought on behalf of "the Commissioner" and not his employee. The defendants' prayer to that exception reads as follows:

> "WHEREFORE", the Defendants herein request:
> 1) This Court dismiss from this suit, with prejudice, the Commissioner of Securities (Fred Dent, Bridger Eglin, Larry Murray) and that the names of Fred Dent, Bridger Eglin and Larry Murray be stricken from the record;
> AND
> 2) This Court dismiss the petitioner's claim against all defendants under the Unfair Trade Practices Act, with prejudice."

The defendants knew, and by their actions admitted, that the statute did not go beyond the Commissioner himself. The statute itself, the statutory definition, and the application by the State Attorney General's Office all restrict the application of any absolute immunity to the Commissioner only. Extending the absolute immunity to those not listed in the statute is legal error. Neither the State through the Office of Commissioner of Securities nor the deputy commissioner are listed in the statute.

Nevertheless, absolute immunity should not apply in this case. La. R.S. 51:720 provides that the Commissioner of Securities shall have immunity to the same extent as any Judge in this state. However, the failure to follow the statutory requirements of due process is not a judicial act. The failure to promulgate any rules and regulations mandated by statute is not a judicial act. The court of appeal properly concluded that there were no rules, either formal or informal, to guide either employees of the department or applicants as to the proper procedures to follow in a licensing proceeding of any kind, as required by the Administrative Procedure Act. La. R.S. 49:952(2). It is the lack of any rules that by definition denied Mr. Amato of procedural due process. There was no procedure.

It is submitted that promulgating basic rules and regulations for a government agency to follow is an administrative act that must be accomplished before the agency can function. The actual application of the rules to a licensee might well be a "judicial" function. The failure to have any rules at all is an administrative function of an omnipotent agency, not an adjudicative function. Compare La. R.S. 49:953 and La. R.S. 49:955.

A judge does not have judicial immunity if the Judge is routinely creating his own rules that deny citizens their right to due process. Pulliam v. Allen, 466 U.S. 522, 104 S. Ct. 1970, 80 L.Ed. 2d 565 (1984). Further a judge is not absolutely immune from civil liability under 42 U.S.C. § 1983 for his or her administrative acts. Forrester v. White, 484 U.S. 219, 108 S. Ct. 219, 98 L.Ed. 2d 555 (1988). Forrester held that a Judge was not absolutely immune from liability in wrongly terminating a court probation officer. The Court distinguished the function of the Judge as administrative as opposed to adjudicatory. Therefore if a Judge is not absolutely immune from having inappropriate rules or in his administrative capacity, then

surely a deputy securities commissioner cannot be immune for failing to promulgate appropriate due process.

II.

The Louisiana Fourth Circuit of Appeal erred in applying the doctrine of qualified immunity to the administrative acts of a State Securities Deputy Commissioner who was solely delegated the non-discretionary responsibility of promulgating rules and regulations under the State Administrative Procedures Act, and by doing so, this Court allowed the deputy to deny a regulated stockbroker due process of law.

Who is Stansbury accountable to and what is he accountable for? The Office of the Commissioner of Securities has no written procedure for reviewing a license, no operations manual, and no rules for formal or informal procedures that a salesman or an employee of the agency can follow. The court held that the lack of these rules and procedures circumvented Mr. Amato's right to due process. Yet, the court found Stansbury was also immune under the qualified immunity doctrine, as well as under absolute immunity.

As the majority noted on page 7 of the opinion, the necessity of procedures and rules is mandatory. La. R.S. 51:710(D); La. R.S. 49:952(2). There is no discretion in whether or not to have "rules of practice setting forth all . . . informal procedures available." The agency shall have them. Immunity is not automatically granted and requires meeting certain tests. Under the two-part test of Rick v. State DOTD, 630 So.2d 1271, 1276-77 (La. 1994), in order to determine immunity, the court must first determine whether the action taken is a matter of choice. If there is no choice, then there is no immunity. Here, Stansbury had no discretion on whether to provide rules to follow nor did he have any with regard to following the statutory rules that existed of notice and a hearing. La. R.S. 51:716(A). He is not immune on that basis.

The Court of Appeal also found Stansbury could not be reasonably expected to know his actions violated Amato's rights. Stansbury unequivocally knew and understood at all times that he could not deprive a broker of his license without due process. He so stated in his letter to Amato's attorney, but, he confused the order of due process. (Plaintiff Ex. 7) He believed that the hearing follows a

denial. He should have known better. He was the person responsible for creating the statutory rules regulating stock brokers.

> Q.Now, the Commissioner of Securities, that agency, the agency of the Office of the Commissioner of Securities, that is a rule making agency?
> A.Yes, it is.
> Q.Now, you helped formulate and make and submit to the legislature the current statutory scheme regulating security laws in Louisiana, is this correct?
> A.Yes, in 1985.
> Q.That was adopted, and specifically you referred to the rule making function of the securities -- Commissioner of Securities Office would be done in accordance with the Administrative Procedures Act; is that not correct?
> A.Yes, all rule making is done according to the Administrative Procedure Act. (TR: Vol IV pgs. 49, 54).

He clearly knew that due process was fundamentally required. He so admitted at trial.

> Q.Is it your appreciation that if you go through this formal process that you must give someone notice and a hearing before you deny their license?
> A.Notice and opportunity of a hearing if we formally deny someone. That is in the statute.
> Q.Is it your feeling or the office -- the Commissioner Office of Securities that if you go through this process informally then you can deny them a license without a hearing?

> A.The only thing the informal process does is it is for informational purposes. It does not deny a person a license. You cannot informally deny a license. There is no statutory provision to deny a license other than what the statute provides. That is the only way to deny it. If a person -- and I think I may the earlier -- want to leave it on there and say you can't do anything to me, forget it, I am not changing anything, we then have to take those steps. We can't say informally you are out of here, you are penalized, you can't do anything here. (TR: Vol V, Pgs. 85, 86).

Stansbury testified that he had worked for the Office of Commissioner of Securities for 17 years. He was delegated this clear cut non-discretionary duty to promulgate the rules for both formal and informal procedures. He did not comply with that mandate for 17 years. It was his responsibility to determine the precedents or rules for withdrawal of applications for whatever reason. It was his nondiscretionary constitutional duty to provide due process of notice and a hearing. He was the person that had to know the process. If he did not know, there could be no due process. However, the Court of Appeal found because he did not know the rules, he was immune under the qualified immunity doctrine.

This is clearly a circular argument. Stansbury was required to provide rules. He did not provide rules. He did not know or follow any rules. Since he did not follow or know any rules, he could not have known he violated Mr. Amato's rights that would have been protected under the rules. No one can seriously argue that Stansbury is immune qualifiedly or absolutely from liability because he did not do his job.

Since Stansbury did not have any internal rules or regulations, as required by law, he should at least have followed the statutory scheme he helped promulgate. Requiring a withdrawal of an application is certainly the same as refusing to register a person, and there is no discretion about whether or not to provide prior notice and a hearing. La. R.S. 51:716(A). Any withdrawal or denial must be accompanied by due process. Stansbury knew that, he was legally

bound to know. To hold that he did not know because he did not do his job and therefore is immune is manifestly unfair.

III.

The Louisiana Fourth Circuit Court of Appeal erred in providing a State Deputy Securities Commissioner immunity from civil liability without allowing a hearing, and by doing so, allowed the State to take advantage of Federal District Court abstention, when said abstention was based on the State's having already waived it's assertions of immunity for the State and the civil service employee.

Robert Amato also filed a parallel Complaint in the United States District Court for the Eastern District of Louisiana, Docket Number 91-4484 on December 10, 1991, against the same defendants. He claimed deprivation of his civil rights under color of state law and therefore damages under 42 USC § 1983. The federal court dismissed that action on June 11, 1992, based upon the doctrine of abstention because of this parallel state action. The federal court specifically held that these individual defendants presumably waived the privilege of immunity and therefore the plaintiff could proceed against all defendants in state court, as Mr. Amato did. (A-). Because of inconsistent holdings in state and federal courts, the defendants have "had it both ways" and have been given advantage of the federal court finding the privilege waived and the state court finding the privilege absolute.

In his state court First Amending and Supplemental Petition, Robert Amato made the State of Louisiana, through the Department of Economic Development, the Commissioner of Securities and the Deputy Commissioner of Securities defendants. Mr. Amato claimed that his civil rights were deprived in violation of the federal constitution and sought compensation and punitive damages. The federal court considered that Amato's rights in a 42 USC § 1983 action would be protected in state court and therefore abstention was proper. Those rights have not been protected because of a legislature preference of immunity to a select individual.

However, states cannot grant immunity to themselves or their employees from liability for depriving a citizen of his or her civil rights; except under general common law immunity concepts.

Moresi v. Department of Wildlife and Fisheries, 567 So.2d 1081, 1084 (La. 1990). Even assuming that there is some sort of judicial immunity available to all of these defendants, it does not apply to administrative acts. Forrester v. White, 484 U.S. 220, 108 S. Ct. 538 (S. Ct. 1988). Amato has a viable "1983" action.

Both the majority and the concurring opinion from the Court of Appeals rely on Moresi v. Department of Wildlife and Fisheries. That case also involved a 42 USC § 1983 civil rights action brought in state court, but that case is factually and legally distinguishable from this case. In Moresi, no clearly established constitutional right was violated and in fact defendants were acting upon probable cause in conducting a search.

In this case, the state failed to provide notice and a hearing or even informal rules and regulations that it was legally required to provide. Those rules were the procedures or processes for the state to follow in protecting Amato's property rights in his license. La. R.S. 49:952(2), 49:961(c); 51:710(D), 51:716(A). Stansbury was the person charged with complying with that law since it had been required from at least 1985. (Year of passage of new security law.) Stansbury testified he drafted the securities law. Therefore, he absolutely knew or reasonably should have known of the law he drafted.

Secondly, the state has absolutely no discretion in whether to provide notice and a hearing before denying Amato a new, old, or transfer of a license. La. R.S. 51:716A and 710(D).

Stansbury absolutely knew or reasonably should have known that law since he drafted the law and it had been in effect since 1985. No immunity applies in this case:

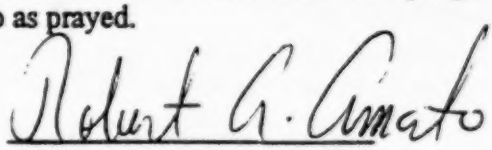
> . . . If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. (Harlow v. Fitzgerald, 457 U.S. 800; 102 S. Ct. 2727 (1982).)

Stansbury cannot reasonably state he did not know the law he drafted. That law requires due process. It requires notice and a hearing which were not remotely granted. Mr. Amato is entitled to recover for deprivation of his civil rights.

CONCLUSION

Wherefore, the Petitioner prays that writ of certiorari should be granted. In the event that the Petition is granted, the Petitioner prays that the decision of the Fourth Circuit Court of Appeals for the State of Louisiana should be reversed and there should be judgment in favor of Robert A. Amato as prayed.

Respectfully submitted,



Dated:
April 26, 1995

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(A)PPENDICES

94-0082 (La;App. 4 Cir. 10/3/94)

Robert AMATO

v.

The OFFICE OF the LOUISIANA COMMISSIONER OF SECURITIES, Bridger Eglin in his capacity as Commissioner of Securities, and Harry C. Stansbury in his capacity as Deputy Securities Commissioner.

No. 94-CA-0082.

Court of Appeal of Louisiana,
Fourth Circuit.

Oct. 3, 1994

Rehearing Denied Nov. 15, 1994.

Reasons for Voting to Grant
Rehearing Filed by Justice Plotkin
Nov. 15, 1994

Before BARRY, BYRNES AND PLOTKIN, JJ.

BARRY, Judge.

Robert Amato appeals the dismissal of his suit for a declaratory judgment and damages based on the defendant's alleged failure to comply with procedural due process requirements of the Louisiana Securities Law. We hold that defendants did not comply with the Louisiana Securities Law; however, the commissioner is immune from liability when acting under the Louisiana Securities Law or under color of law. We affirm.

FACTS

Amato is a stock broker and specializes in selling "penny stocks" i.e., stocks under $5.00 a share. He testified that in June 1987

he began working for Brennan Ross Securities which ceased operations in October 1990. On October 31, 1990 Amato resigned and in early November 1990 Brennan Ross submitted a form U-5, Uniform Termination Notice for Securities Industry Registration, to the National Association of Securities Dealers (NASD) to notify them of Amato's termination.

2Amato applied for employment with Adams Securities and on November 1, 1990 he completed a form U-4, form application For Securities Industry registration or Transfer. As Amato's prospective employer, Adams Securities submitted the U-4 in November or early December 1990 to register Amato through the NASD. Mr. Daniel Bagdanov, compliance director for Adams Securities, testified by deposition that the U-4 is prepared by the employee but submitted by the firm.1

Bagdanov testified that on December 19, 1990 he received a telephone call from Deputy Securities Commissioner Harry Stansbury. The context of that conversation is disputed, but it is agreed that Stansbury told Bagdanov that amato's U-4 was incomplete because it failed to disclose a Louisiana investigation of Amato.

According to Amato, he did not have notice that he was the subject of an investigation by the Louisiana Securities Commissioner. Stansbury testified that there is no such thing as notice of an investigation and the Louisiana Commissioner's office does not maintain a file on persons under investigation which Amato could check. However, Stansbury believed that Amato should have known of the investigation and reported it after Amato signed for a subpoena directed to Brennan Ross Securities.

1.Bagdanov did not testify at trial. References to Bagdanov's testimony refer to his deposition which was submitted i n evidence

2. Stansbury acknowledged on cross examination that the Louisiana Securities Law does not specifically require that a pending state investigation be reported on an application. See LSA-R.S. 51:703(C)(1). However, the U-5 form does require than an investigation be reported.

Bagdanov stated that Stansbury called him on December 28, 1990 and demanded the immediate withdrawal of Amato's U-4, subject

to suspension of Adams Securities' license. That testimony was corroborated by Amato, who testified that Bagdanov relayed that information to him shortly after December 28, 1990. Stansbury denied that he demanded withdrawal of the U-4, but 3 admitted that he told Bagdanov that failure to withdraw the application would result in the denial of Adams Securities' license. Stansbury testified that the options available to Adams Securities were to amend or withdraw the U-4 or risk non-renewal of the firm's license, a disciplinary measure. Adams Securities filed a form U-5 and withdrew Amato's application.

Amato's legal counsel inquired about Amato's application and was told by Stansbury that because Amato's U-4 was withdrawn there was no pending application and nothing for Stansbury to rule upon.

On April 10, 1991 Amato filed this suit for injunctive relief and a declaratory judgment. He amended his petition to pray for damages resulting from the defendants' alleged violation of Amato's due process rights. On April 11, 1991 amato completed an amended U-4 application and disclosed the Louisiana investigation. The Louisiana Commissioner's Office approved his application shortly thereafter.

The trial court ruled in favor of defendants and amato appeals. The defendants answer the appeal and contest the trial court's assessment of costs. the issues are whether Amato was denied due process; whether the trial judge erred in his factual findings; and quantum (the trial court rendered judgment for defendants and assessed damages).

DUE PROCESS

Amato argues that he was refused registration without notice or opportunity for a hearing in violation in violation of due process. He contends that Stansbury's insistence upon withdrawal of the U-4 without formal notice effectively refused his registration without affording him an opportunity for a hearing. Defendants respond that the U-4 was voluntarily withdrawn by Adams 4Securities and there was no pending application until the amended U-4 was submitted in

April 1991. thus, there was no refusal or denial of amato's registration.

The regulation of securities in Louisiana is governed in part by the Louisiana Securities Law, LSA-R.S. 51:701 et seq. Section 703 controls the application and registration of a securities salesman.

Under Section 703(C)(4), the registration of a salesman automatically terminates from the time of termination of employment. Amato resigned from Brennan Ross October 31, 1990. Brennan Ross ceased operations in October 1990 and submitted the U-5 termination notice in early November 1990. Joseph Long, was qualified as an attorney and testified for the defense, stated that a salesman's transfer from one broker-dealer to another is usually simultaneous. The NASD Central Registration Depository (a computer filing system) listed the application as a transfer, but there is no evidence that Amato submitted an application for transfer before or simultaneously with the U-5 termination notice. Thus amato's registration terminated when his employment terminated and Brennan Ross submitted the U-5 termination notice. Thus Amato's registration terminated when his employment terminated and Brennan Ross submitted the U-5 termination form on his behalf. His subsequent application was one for re-registration rather than transfer.

Section 703(C)(4) provides that when an individual completes an application for registration,

> the commissioner shall register such applicant as a salesman, unless he finds that such applicant is not of good business reputation or does not appear to be qualified by training, experience, or knowledge of the securities business to act as a salesman of securities.

> sIf the commissioner finds that an applicant omitted any material fact required to be stated in the application, that omission may support a finding by the commissioner that the applicant is not of "good business reputation." See SS 703(E)(2) and 704(A)(1). That would presumably be sufficient ground to refuse to register an applicant under S 703(C)(3).2

The Louisiana Securities Law clearly contemplates that an applicant be afforded notice and an opportunity for a hearing prior to

refusal of his registration. Section 703(E)(1) provides in pertinent part:

If, *after affording an applicant a hearing or an opportunity for a hearing* as provided in R.S. 51:716, the commissioner finds that there are sufficient grounds to refuse to register such applicant as provided in this Section, he shall issue an order refusing to register such applicant. (Emphasis added)

Section 716(A) requires:

Before entering an order refusing to register any person under R.S. 51:703, ... *the commissioner shall promptly send to such person and, if such person is a salesman to the dealer who employs or proposes to employ such salesman a notice of opportunity for hearing.* (Emphasis added)

Section 716(A) requires:

Before entering an order refusing to register any person under R.S. 51:703, ... *the commissioner shall promptly send to such person and, if such person is a salesman to the dealer who employs or proposes to employ such salesman a notice of opportunity for hearing.* (Emphasis added)

Section 716(B) provides that the notice and hearing shall be in the manner prescribed in the Administrative Procedure Act, LSA-R.S. 49:950 et seq.

The defendants argue that Sections 703 and 716 are inapplicable because Adams Securities withdrew amato's U-4 application and there was no refusal of registration. The trial judge apparently agreed and stated in his reasons:

«Since Adams Securities withdrew the plaintiff's U4 by filing a U5, it is questionable whether (the Administrative Procedure(s) Act) ever applies.

Stansbury acknowledged that denial could be made only through the statutory process and testified that he used the informal procedure for informational purposes. Joseph Long testified that the informal procedure involving withdrawal of an incorrect application is common across the United States and avoids the formal process of denial.

(1,2) Neither the Louisiana Securities Law nor the Administrative Procedure Act sets forth an informal procedure for refusal of registration, particularly where, as here, the validity of the

underlying facts are in dispute. Compare *Louisiana State Board of Medical Examiners v. Bertuccci,* 593 So.2d 798 (La.App. 4th Cir.1992) which recognized the existence of a legislatively mandated informal compliance procedure within the Administrative Procedure Act. In *Bertucci* this Court considered the requirements for revocation, suspension, annulment or withdrawal of an existing license under LSA-R.S. 49:961(C) and held that, in addition to the basic procedural due process elements of notice and an opportunity for a hearing, $ 961(c) required that the licensee be given an opportunity to show compliance prior to the opportunity to show compliance prior to the institution of formal proceedings. This Court stated that "()he purpose of the additional compliance opportunity of subsection (C) is to 'short circuit' the procedure." *Id.* at 801. Unlike *Bertucci,* Amato's license was terminated before his U-4 was submitted and $ 961(C) is not applicable. However, *Bertucci* clearly indicates that an informal procedure is appropriate when statutory requirements are met.

(3) An informal procedure under the Louisiana Securities Law must comply with that law. It must be established and promulgated as required by statute and cannot be used to circumvent the statutorily imposed requirements for notice and an opportunity for a hearing which are an integral part of the formal process of denial.

(4) The procedure used by Stansbury was not promulgated as required by law. The Louisiana Securities Law grants to the Commissioner of Securities the power to make "such rules and regulations from time to time as he may deem necessary and proper for the enforcement of (the Louisiana Securities Law)." Such rules and regulations shall be adopted, promulgated and contested as provided in the Administrative Procedure Act. LSA-R.S. 51:710(D).

The Administrative Procedure Act states that each agency which engages in rule making shall:

> Adopt rules of practice setting forth the nature and requirements of all formal and informal procedures available.

LSA-R.S. 49:952(2).

Stansbury testified that there is no written procedure for reviewing a salesman's license. There is no operations manual and the state's statutes provide the only guide. There is no evidence of a rule of practice setting forth the nature and requirements of the informal procedure utilized by Stansbury to refute the sufficiency of Amato's U-4 application or to obtain its withdrawal. That clearly violates the procedure for adopting rules under the R.S. 51:710 and R.S. 49:952(2).

(5) Moreover, Stansbury's call for the withdrawal of Amato's application for license subject to non-renewal of Adams Securities' license without providing an opportunity to show that the application complied with the requirements exceeded the purported purpose of avoiding the formal process of denial; it circumvented the requirements of notice and opportunity for a hearing statutorily afforded to an applicant prior to refusal of his license, and infringed on Amato's right to procedural due process.

IMMUNITY

Defendants filed an exception of lack of jurisdiction based on immunity and the trial court denied that exception. Defendants also assert the affirmative defense of absolute and qualified immunity based on the Louisiana Securities Law (LSA-R.S. 51:720) and the discretionary acts doctrine (LSA-R.S.9:2798.1). The judgment does not address immunity and it is only briefly addressed by the parties. This is a case of first impression.

The Louisiana Securities Law provides immunity of the commissioner from suit. LSA-R.S. 51:720 provides:

> For any action taken or any proceeding had under this Part or under color of law, the commissioner shall be immune from liability and suit to the same extent that any judge of any court of general jurisdiction in this state would be immune.

(6-8) Louisiana jurisprudence on judicial immunity mirrors the federal doctrine. *Moore vs. Taylor*, 541 So.2d 378, 381 (La.

App.2d Cir.1989). For a judge, an absolute immunity from liability and damages attaches when the judge performs a function that is integral to the judicial process. *Johnson v. Foti*, 583 So.2d 1210, 1212, (La.App. 4th Cir. 1991); see *Moore v. Taylor*, 541 So.2d at 381. Although immunity does not attach to an administrative (as opposed to judicial) act, *Forrester v. White*, 484 U.S. 219, 108 S.Ct. 538 98 L.Ed.2d 555 (1988), the question of whether an act is judicial in character does not depend on whether it is discretionary or ministerial. *Johnson v.Foti*, 583 So.2d at 1212. 9"Immunity is justified and defined by the *functions* it protects and serves, not by the person to whom it attaches," *Forrester v. White*, 484 U.S. at 227, 108 S. Ct., at 544 (Emphasis is original)

(9,10) Applying these principles to the Securities Commissioner, absolute immunity from damages attaches to an action that is integral to the function of the commissioner's office. The evaluation of an application and registration of a securities salesman are integral to the effective function of the commissioner's office. Moreover, the immunity is justified because of special problems which might arise if the commissioner of such a highly regulated industry as the securities industry were exposed to liability under the Louisiana Securities Law. Compare *Forrester v. White*, 484 U.S. at 223, 108 S. Ct. at 542, in which the supreme Court discussed the inhibiting and perverse incentives that result from the threat of liability on some governmental officials. therefore, we hold that defendants are immune from civil liability.

Pulliam v. Allen, 466 U.S. 522, 104 S.Ct. 1970, 80 L.Ed.2d 565 (1984), cited by the dissent, merely holds that judicial immunity is not a bar to the award of attorney fees under 42 U.S.C. $ 1988 (Civil rights Attorney Fees Awards Act of 1976) where the judge is not immune from the underlying relief on which the award is premised. That underlying relief in *Pulliam* was not in the form of damages, but rather, $ 1983 collateral injunctive relief against a state magistrate who was setting bail for non-jailable misdemeanors. *Pulliam* has no bearing on our analysis which recognizes limitations on absolute judicial immunity.

(11,12) Even if defendants were not absolutely immune from liability, the doctrine of qualified immunity shields them from liability. A government [10]official who performs a discretionary function is generally shielded from liability for civil damages insofar as the offical's conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Moresi v. Department of Wildlife & Fisheries*, 567 So.2d 1081, 1085 (La.1990), quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed. 2d 396 (1982); *Malina v. Gonzales*, 994 F.2d 1121, 1125-26 (5th Cir. 1993).

(13,14) The qualified immunity inquiry "focuses on whether the contours of the right allegedly violated were sufficiently clear such that a reasonable official would understand that his action violated that right". *Malina v. Gonzales*, 994 F.2d at 1125-26. An official cannot reasonably be expected to know at the time an action occurs that the law forbade conduct that was not previously identified as unlawful. *Moresi v. Department of Wildlife & Fisheries*, 567 So.2d at 1085. Compare LSA-R.S. 9:2798.1, which delineates the discretionary acts doctrine for government entities and employees generally and reads in pertinent part:

> B. Liability shall not be imposed on public entities or their officers or employees based upon the exercise or performance based upon the exercise or performance or the failure to exercise or perform their policy-making or discretionary acts when such acts are within the course and scope of their lawful powers and duties.

There is no recorded precedent for the withdrawal of an application which the deputy securities commissioner ostensibly believed was inadequate. We hold that Stansbury could not reasonably be expected to know that his action violated Amato's rights. Therefore, his action is shielded by qualified immunity.

[11]The dissent attempts to distinguish *Moresi* as a federal civil rights action and asserts that the proper test for a qualified immunity is set forth in *Rick v. State, Department of Transportation & Development*, 630 So.2d 1271 (La.1994); and *Simeon v. Doe*, 618

So.2d 848 (La. 1993), citing *Fowler v. Roberts*, 556 So.2d 1 (La.1989), *on rehearing.*

Amato alleged in his Amended Petition "(t)that said acts of defendants also constitute deprivation of petitioner's civil rights in violation of state and federal constitutional and statutory rights...." and he argues in brief that he "is entitled to recover damages under 42U.S.C. $ 1983 for deprivation of his civil rights." *Moresi* is applicable.

(15) The two prong rest set forth in *Rick* and in *Simeon* is not appropriate in this case. That test is valid for an analysis of the discretionary immunity for public entities and employees under R.S. 9:2798.1, but 51:720 grants to the commissioner immunity "to the same extent that any *judge* of any court of general jurisdiction in this state would be immune." (Emphasis added)

> The Louisiana Supreme Court noted that the discretionary function exception to state governmental liability established by (9:2798.1) is essentially the same as the exception in the Federal Tort Claims Act (28 U.S.C. $ 2680(a)).

Fowler v. Roberts, 556 So.2d at 15.

Section 2680(a) of the FTCA grants a discretionary function exception to liability of a government employee. The FTCA contains a separate section which grants *judicial* immunity to liability under the Act. Specifically, 28 U.S.C. $ 2674 provides in pertinent part:

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

Rick v. State, Department of Transportation & Development, Simeon v. Doe and Fowler v. Roberts did not involve judicial

immunity, and under the statutory mandate the immunity in this case must be defined according to the extent of judicial immunity. It is further noted that the federal cases in *Rick* and in *Fowler* (in which the Louisiana Supreme Court first enumerated the two prong test for 9:2798.1) did not involve judicial immunity. Rather, the majority were cases brought under the FTCA.[3]

COSTS

Defendants answer the appeal and claim the trial court abused its discretion by ordering each party to bear its own costs.

(16,17) The trial court has great discretion in awarding costs and may render judgment as it considers equitable. LSA-C.C.P. art. 1920. *Earles v. Ahlstedt,* 591 So.2d 741 (La.App. 1st Cir.1991). The assessment of costs against a prevailing party has been considered an abuse of discretion absent proof that the prevailing party has been considered an abuse of discretion absent proof that the prevailing party incurred costs pointlessly or engaged in other conduct that justified the assessment of costs against it. *Flair v. Board of Commissioners of Orleans Levee Board,* 411 so.2d 614, 618 (La.App. 4th Cir. 1982); *Polk Chevrolet, Inc. v. Webb,* 572 So.,2d 1112, 1116 (La.App. 1st Cir. 1990), writ den. 575 So. 2d 394 (La.1991). Nevertheless, because Amato's first assignment of error on appeal has some merit, we do not disturb the trial court's assessment of costs. See *Holdsworth v. Holdsworth,* 621 So.2d 71 (La. App.2d Cir.1993).

[13]*CONCLUSION*

The defendants did not comply with the Louisiana Securities Law and violated Amato's right to due process. However, the commissioner acted in good faith and is shielded from liability under the Louisiana Securities Law or color of law. We pretermit Amato's remaining assignments of error.

3. The cases relied upon by the dissent are all distinguished above and are inapplicable. The constitutionality of LSA-R.S. 51:720 is not before this Court.

AFFIRMED.

BYRNES, J., concurs with reasons.

PLOTKIN,J., concurs in part, dissents in part with written reasons.

BYRNES, Judge, concurs with reasons:

I agree with Judge Barry. The doctrine of absolute immunity is not dead in Louisiana. *Moresi v. Department of Wildlife and Fisheries*, 567 So.2d 1081, 1084 (La. App. 1990).

I share Judge Plotkin's sympathy for Mr. Amato's plight. That he has suffered unjustly as the result of the mishandling of this matter by the office of the Louisiana Securities Commission cannot be denied. Judge Barry's opinion recognizes that. However, that does not give Mr. Amato the right to pursue the Louisiana Securities Commissioner individually. Judge Barrys statement of the facts and the law is correct.

PLOTKIN, Judge, concurs in part and dissents in part with reasons:

This is a case of first impression in Louisiana, which is significant to the jurisprudence interpreting governmental immunity in this state.

I concur in the majority's conclusion that Assistant Commissioner Harry C. Stansbury's actions denied plaintiff Robert Amato his right to due process because he was not afforded an opportunity for a hearing on the issue of the registration of his license to sell securities. however, I disagree with the majority's conclusion that Stansbury is entitled to immunity from liability for his actions.

This case involves an action seeking a temporary restraining order issued to the Louisiana Commissioner of Securities, as well as any person acting on his behalf, from doing the following:

> continuing to deny re-registration or registration to Robert Amato as a Series 7 Securities Representative in the State of Louisiana; and further ordering the Commissioner of Securities to issue a sales license as a Series 7 Securities Representative to Robert amato within forty-eight (48) hours

> of receiving an application for same from a licensed broker/dealer; further to direct the Commissioner of Securities to so inform Mr. Dan Bagdanov of Adams Securities of same so that Robert Amato can proceed with his duties and employment with Adams Securities; and further to direct that Deputy Commissioner Stansbury be ordered to cease and desist from taking any official or unofficial action of any kind in this matter or in regard to Robert Amato's business as a Series 7 Securities Representative.

Amato also sought a declaratory judgment in the form and substance of the temporary restraining order. Amato later amended his petition, seeking damages resulting from the denial of his due process rights. The trial court dismissed the suit.

Despite finding that Stansbury violated Amato's constitutional due process rights to notice and a hearing prior to denial of his application for re-registration, the majority affirms the trial court's dismissal of Amato's suit. The majority's conclusion is based primarily on its finding that Stansbury, as deputy commissioner of securities, is entitled to absolute immunity from suit under LSA-R.S.51:720, which equates the immunity due the securities commissioner with judicial immunity. In so doing, the majority bases its decision on an issue which was treated insignificantly by the parties, since it is barely addressed in the briefs filed by the parties in this court.

Although LSA-R.S. 51:720 was passed by the Louisiana legislature in 1985, no reported cases have interpreted its provisions. that fact notwithstanding, the majority has chosen to interpret the provision, which expressly provides that the Securities Commissioner "shall be immune from liability and suit to the same extent that any judge of any court of general jurisdiction in this state would be immune," very broadly and in such a way as to extend absolute immunity for all types of suits to virtually every employee of the Department of Securities.

For the reasons set forth below, I believe that the majority's conclusions on this issue are specious. First, the majority incorrectly holds that the Securities Commissioner and his employees are entitled under LSA-R.S.51:720 to absolute immunity. However, a close study of the caselaw reveals that even the traditional judiciary is no longer entitled to absolute immunity from all types of suits.

Significantly, the United States Supreme Court held specifically in *Pulliam v. Allen*, 466 U.S. 522, 104 S.Ct. 1970, 80 L.Ed. 2d 565 (1984), that members of the judiciary are not immune from suits for injunctive relief or from being held liable for attorney's fees incurred in seeking that injunctive relief. although the instant suit does, by amendment, involve a request for monetary damages, it primarily seeks a temporary restraining order and a declaratory judgment, both of which would seem to fall within the exceptions to the judicial immunity doctrine for injunctive relief as established by *Pulliam*.

Further, I see grave problems with the legislature's enactment of specialized legislation extending judicial immunity to a bureaucratic office of the executive branch, such as the Securities Commissioner. Traditionally, executive branch department heads are primarily considered to makers and administrators of policy. As such, members of the executive branch of government have traditionally been extended only qualified immunity, as evidenced by LSA-R.S. 9:2798.1. The difference between absolute immunity and qualified ɔimmunity is that absolute immunity is a complete bar against suit for damages arising from a judge's conduct, while qualified immunity is an affirmative defense that protects government officials performing discretionary functions if their conduct does not violate clearly established statutory or constitutional rights known to all reasonable persons.

Further, I believe that the constitutionality of LSA-R.S. 51:720 under the provisions of La. const. art. XII 10(A) is questionable. That constitutional article provides as follows:

> Neither the state, a state agency, nor a political subdivision shall be immune from suit and liability in contract or for injury to person or property.

In *Chamberlain v. State DOTD*, 624 So.2d 874 (La.1993), the Louisiana Supreme Court found that the legislature's power to enact laws which abrogate the effect of the abolition of state sovereign immunity evidenced by LA. Const. art. XII 10(A) are subject to constitutional challenges. In that case, the court found a cap on damage awards against governmental agencies unconstitutional, stating as follows:

> (T)he correct construction of Section 10(A) is that it implicitly inhibits the legislature's power to restrict recoverable tort damages.

Id. at 887.

The *Chamberlain* decision noted that La. Const. XII 10(A) creates a constitutional right to sue the state in tort and held that right cannot be legislatively curtailed. Thus, said the Supreme Court, LA Const. XII 10(A) removed the legislature's former discretionary right to consent to suit and liability in tort, and instead "reserved that right inviolate to the people, making that right a concrete one, beyond the legislature's reach". *Id.* The cap on tort damage awards was proscribed by that constitutional provision , the court said, because :decreasing recovery from full compensation to a maximum ceiling partially resurrects immunity." *Id.* The underpinning of this holding is that the legislature is not allowed to erode the constitutional provision eliminating the sovereign immunity doctrine by passing legislation which would gradually lead to the resurrection of that doctrine. LSA-R.S. 51:720 is unquestionably a partial resurrection of sovereign immunity.

I recognize that the issue of the constitutionality of LSA-R.S. 51:720 was not raised by the parties in the instant case; however, as I stated previously, the parties treated the immunity issue as very insignificant. Since the majority has chosen to base its entire decision on the finding that the commissioner and his employees are

entitled to absolute immunity from Amato's suit, I feel it is necessary to raise this important issue, especially in light of the long-term effects of the decision.

I also believe that the provisions of LSA-R.S. 51:720 conflict with the provisions of LSA-R.S. 9:2798,1, which was designed and intended to apply to all public officials in the executive branch of Louisiana state government. I see LSA-R.S. 51:720 as special interest legislation which should not be allowed to "trump" the provisions of LSA-R.S. 9:2798.1, which applies to all other agencies on the same level as the Securities Commissioner.

Thus, I would find that Stansbury is not entitled to absolute immunity from amato's suit and would consider only whether Stansbury is entitled to qualified immunity under the current legislative and jurisprudential interpretations of LSA-R.S. 92798.1, which codifies the public duty/private duty doctrine. That statute provides, in pertinent part, as follows:

> B. Liability shall not be imposed on public entities or their officers or employees based upon the exercise or performance or the failure to exercise or perform their policy-making or discretionary acts when such acts are within the course and scope of their lawful powers and duties.
>
> C. The provisions of Subsection B of this Section are not applicable:
> (1) To acts or omissions which are not reasonably related to he legitimate governmental objective for which the policy-making or discretionary power exists or
>
> (2) To acts or omissions which constitute criminal, fraudulent, malicious, intentional, willful, outrageous, reckless, or flagrant misconduct.

The Louisiana Supreme Court has established the following two-part test for determining whether a public official's actions are entitled to qualified immunity under the above provision:

> First, a court must determine whether the action is a matter of choice. If no options are involved, the exception does not apply. If the action involves selection among alternatives, the court must determine whether the choice was policy based. Decisions at an operational level can be discretionary if based on policy.

Rick v. State, DOTD, 630 So. 2d 1271, 1276-77 (La.1994), citing *Berkovitz by Berkovits v. U.S.*, 486 U.s. 531, 108 S.Ct. 19544, 100 L.Ed.2d 531 (1988); *U.S. v. Gaubert*, 499 u.s. 315, 111 S. CT. 1267, 113 L.Ed.2d 335 (1991). See also *Simeion v. Doe*, 618 So.2d 848, 852-53(La.1993), *Fowler v. Roberts*, 556 So. 2d 1 (La.1993) (On rehearing). I believe that consideration of the facts of this case under the two-part test quoted above makes it clear that Stansbury;s actions are not entitled to immunity under LSA-R.S. 9:2798:1.

sIn fact, Stansbury's actions do not even pass the first prong of the *Fowler/Simeon/Rick* test, which focuses on whether his actions are specifically prescribed by a statute, regulation, or policy. LSA-R.S.51:716(A) specifically prescribes the actions of the securities commissioner under the circumstances provided by this case, providing, in pertinent part, as follows:

> Before entering an order to refusing to register any person under R.S. 51:703, and after the entering of any order for revocation or suspension, the commissioner shall promptly send to such person and, if such person is a salesman to the dealer who employs or proposes to employ such salesman a notice of opportunity for hearing.

Further, the procedure for serving notice of the opportunity for hearing is established by the Administrative Procedure Act, specifically LSA-R.S. 49:961(C), which provides, in pertinent part, as follows:

> No revocation, suspension, annulment, or withdrawal of any license is lawful unless, prior to the institution of agency proceedings, the agency gives notice by mail to the licensee of facts or conduct which would warrant the intended action and the licensee is given an opportunity to show compliance with all lawful requirements for the retention of the license.

See also Louisiana State Board of Medical Examiners v. Bertucci, 593 So.2d 798 (La.App. 4th Cir. 1992)

Thus, Stansbury did not have the discretion to deny Amato's license without giving Amato himself notice and opportunity to be heard. despite that fact, Stansbury failed to fulfill the requirements of the statute which prescribed his conduct under the circumstances of this case. Although Stansbury gave notice to Amato's prospective employer via a telephone call, Stansbury did not give notice to Amato himself. as a result of Stansbury's failure to follow these statutory requirements, amato was denied his right to due process. The statutory requirements do not afford stansbury the discretion to give notice only to Amato's prospective employer and not to Amato himself.

Since Stansbury's actions do not meet even the first prong of the *Fowler/Simeon/Rick* test, there is no need to consider the second prong of the test. However, I would note that no social, economic, or political policy prevented Stansbury from fulfilling the requirements of the statute requiring him to give Amato notice and opportunity for hearing prior to the denial of his application for registration. thus, the majority was clearly wrong in holding that Stansbury was entitled to qualified immunity from liability for his actions under LSA-R.S. 9:2798.1.

The majority opinion fails to analyze Stansbury's actions according to the two-part test established by *Fowler* and reaffirmed in *Simeon and Rick*, relying instead on language from a 1990 Louisiana Supreme Court case which dealt with immunity in a federal civil

rights action, *Moresi v. Department of Wildlife & Fisheries*, 567 So 2d 1081, 1085(La.1990). Using the *Moresi* case, the majority holds that the pertinent inquiry is whether the official could reasonably be expected to know that the law forbade his conduct. The majority then concludes that Stansbury could not have been expected to know that his actions violated amato's rights because of the lack of any recorded precedent for the withdrawal of an application which he believed was inadequate.

I disagree with that conclusion. as noted above, Stansbury's actions of notifying Amato's prospective employer of the fact that his application was allegedly inadequate because of his failure to report an investigation which he knew nothing about were prescribed by the statutes governing the Office of the Securities Commissioner. thus, I believe that Stansbury would not be entitled to immunity even under the *Moresi* test.

Accordingly, I would find that Stansbury is not immune from liability for any damages suffered by amato as a result to the unlawful denial of his application for registration. Public officials who negligently perform their duties are subject to personal liability, even the absence of malice or bad faith. See *Akins v. Jefferson Parish*, 529 So.2d 27, 31 (La. App. 5th Cir.), *rev'd in part on other grounds* 533 So.2d 970 (La.1988), *rev'd on reh'g* 539 So.2d 44 (La.1989). thus, I would reverse the trial court judgment and remand the case to the district court for determination of damages.

ADDITIONAL REASONS FOR GRANTING REHEARING

(Filed Nov. 15, 1994)

I would grant rehearing for the reasons discussed in my dissent to the original opinion issued by this court. Additionally, I would grant rehearing because the Exception of Lack of Jurisdiction filed by the defendants citing the immunity of the securities commissioner provided by LSA-R.S. 51:720 seeks dismissal of the

complaint only in the names of the "Commissioner of Securities (Fred Dent, Bridger Eglin, Larry Murray)," and not in the name of Deputy Securities Commissioner Harry Stansbury. Thus, Stansbury would not be entitled to dismissal under the immunity provisions even if it were valid and legal since he failed to plead that defense.

94-3024 (La. 2/3/95)

Robert **AMATO**

v.

The OFFICE OF the LOUISIANA COMMISSIONER OF SECURITIES, Bridger Eglin in His Capacity as Commissioner of Securities, and Harry C. Stansbury in His Capacity as Deputy Securities Commissioner.

No. 94-C-3024

Supreme Court of Louisiana

Feb. 3, 1995

Prior report: La.App., 644 So. 2d 412.

In re Amato, Robert;-- Plaintiff(s); applying for writ of certiori and/or review; Parish of Orleans, Civil District Court, Div. "L", No. 91-6995; to the Court of appeal, fourth Circuit, No. 94CA-0082.

Denied

LEMMON and JOHNSON, JJ., would grant the writ.

CALOGERO, C.J., not on panel.

MINUTE ENTRY
SEAR, J.
JUNE 17, 1992
filed June 18, 1992

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NO. 91-4484
SECTION "G"

ROBERT A. AMATO

VERSUS

STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF ECONOMIC DEVELOPMENT, ET AL

MEMORANDUM AND ORDER

Plaintiff Robert Amato filed this action against Harry Stansbury, Deputy Commissioner of Securities for the State of Louisiana, in his individual capacity, for violations of his constitutional rights, pursuant to 42 U.S.C. 1983. Plaintiff alleges that the defendant failed to timely approve plaintiff's application to register as a securities salesmen with the Louisiana Commissioner of Securities.[1] Defendant Stansbury has moved the Court to abstain from exercising its jurisdiction and, alternatively, for summary judgment in his favor.

Plaintiff was a registered securities salesman in Louisiana and worked for Brennan Ross Securities. On October 31, 1990, plaintiff voluntarily resigned from his employment because Brennan Ross closed its business. Pursuant to Louisiana securities law, plaintiff's resignation automatically terminated his registration with the Commissioner of Securities for Louisiana (the "Commissioner").[2] Adams Securities, a broker/dealer doing business in Louisiana, hired

plaintiff. Thereafter, plaintiff sought to register with the Commissioner.

Louisiana securities law requires sellers and dealers of securities to register with the Commissioner.[3] Additionally, the registration of salesmen and dealers expire on December 31 and must be renewed for the next calender year.

A salesman prepares his application for registration on a form U-4. Both the salesman and the dealer employing the salesman must execute the form.[4] The application must contain certain personal, professional and employment information about the applicant, including his registration with other state or federal agencies. Additionally, the applicant must disclose the details of any disciplinary proceeding instituted by any state or federal securities commission against the applicant, and of any conviction or charge against the applicant for a misdemeanor involving fraud or securities business or for a felony.[5] Along this vain, form U-4 requires disclosure of pending investigations into the applicant's securities business affairs by federal or state regulatory agencies.

When the applicant has fully complied with these requirements, the Commissioner must register the applicant as a salesman, unless he finds that the applicant is not of good business reputation or is not qualified. [6] An applicant is not of good business reputation if, among other things, he willfully makes a false or misleading statement on, or omits a material fact from, his application.[7] Before refusing to register an applicant, the Commissioner must provide the salesman and his employer with the opportunity for a hearing. [8]

1 Plaintiff also named the Louisiana Department of Economic Development and Louisiana Commissioner of Securities as defendants. Plaintiff has since dismissed his claims against these defendant.

2. La. Rev. Stat. Ann. 51:703(C) (4).

3 Id. 703(A)(1).

4 Id. 703(C)(1)

5 Id.

6 Id. 703(C)(3).

7 Id. 704(A)(1).

8 Id. 716(A).

In November 1990, plaintiff submitted a Form U-4 to the Commissioner, and, in accordance with this procedure, plaintiff disclosed a pending investigation by the National Association of Securities Dealers, Inc. ("NASD"). [9] Yet, upon review of plaintiff's application, defendant noted that it did not disclose the pending investigation by the Louisiana Securities Commission,[10] arising out of the same factual circumstances that are the subject of the NASD investigation. [11] Defendant informed Adams Securities of the omission. [12]Defendant claims he advised Adams Securities that, upon receipt of an amendment disclosing this investigation, he would consider the application. [13] When an amendment was not received by the last working day of the calendar year, at which time Adams Securities' registration would expire and it would need to seek a renewal, defendant claims he advised Adams Securities that the omission on plaintiff's application could affect the renewal of Adams Securities' registration. Defendant asserts further that he then suggested that Adams Securities withdraw the application and resubmit it during the next calendar year.[14] Adams Securities then withdrew plaintiff's application.[15]

Plaintiff asserts that he did not disclose the Louisiana Securities Commission investigation because he was not aware that the Louisiana Securities Commission was investigating him, although he knew the commission was investigating his former employer, Brennan Ross Securities. [16] Plaintiff further contends that defendant's actions effectively amount to a refusal to register him, without the opportunity for a hearing. Plaintiff thus contends that the defendant's actions violated his constitutional rights.[17]

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9 :Form U-4 Original, " Exhibit to defendant's motion for summary judgment.

10 Affidavit of Harry Stansbury, 7.

11 Id. Plaintiff offers no evidence to dispute this fact.

12 Plaintiff's complaint, XIII; affidavit of Stansbury, 9

13 Affidavit of Stansbury, 13. Plaintiff alleges that defendant stated that, under no circumstances would he register plaintiff. Complaint XIII.

14 Affidavit of Stansbury, 14016, 18.

15 Complaint XV, XVI; Affidavit of Stansbury 17.

16. Deposition of plaintiff, exhibit 16 to plaintiff's opposition.

17 Complaint XVI-XVIII,XXI.

On March 10, 1991, plaintiff filed a petition in Civil District Court for the Parish of Orleans, seeking a temporary restraining order and injunction, to enjoin defendant from denying plaintiff registration. Plaintiff alleges the same facts as set forth in the complaint before this court and claims that his constitutional rights have been violated thereby. On April 10, 1991, the state court judge presiding over plaintiff's claim held a conference, after which he ordered the defendant to show cause on April 12th why a preliminary injunction should not be issued. Plaintiff then continued without date the hearing on the rule to show cause. On April 19, 1991, Adams Securities again filed an application to register plaintiff, which the Commissioner granted on May 7, 1991. [18] On November 27, 1991, plaintiff amended his state court petition to seek monetary relief; yet, on November 10, 1991, plaintiff filed the complaint before this Court, seeking the same relief based on the same facts as that asserted in the state court proceeding. [19] Based on these facts, the defendant argues that this Court should abstain from exercising its jurisdiction because of the parallel state court proceedings. Specifically, defendants contend that the abstention doctrine enunciated in Colorado River water Conservation District v. United States, 424 U.S. 800, 96 S. Ct. 1236 (1976) applies. In Colorado River, the Supreme Court stated that, despite the pendency of parallel state court proceedings, federal courts have an unflagging obligation to exercise their jurisdiction. Nonetheless, the presence of certain important factors may outweigh this obligation and render abstention proper. The court should consider the desirability of avoiding piecemeal litigation, the inconvenience of the federal forum, the order in which jurisdiction was obtained, whether the governing law is state or federal, and whether the state court proceedings adequately can protect the federal plaintiff's right.[20]

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18 Affidavit of Stansbury 19, 22. Plaintiff does not contest these facts.

19 Exhibit LSC-2, attached to defendant's motion for summary judgment, consists of all the state court documents, which I have reviewed.

20 Colorado River, 96 S. Ct. at 1247; Moses H. Cone Memorial hosp. v. Mercury Constr., 103 S. Ct. 927, 941-42 (1983).

First, the desire to avoid piecemeal litigation is apparent in this matter. The factual allegations and relief sought in the state court petition are identical to that of the federal complaint. The issue in both actions is whether plaintiff's state and federal constitutional rights were violated by defendant's actions under Louisiana Securities Laws. Therefore, a hearing of this matter in both the state and federal courts would constitute the type of duplicative litigation Colorado River seeks to avoid.

Second, the state court obtained jurisdiction more than six months prior to this federal court. Yet, priority should not be measured exclusively by which complaint was filed first. Rather, the court should consider the degree of progress made by the state and federal court. this motion to dismiss is the first judicial action taken in the federal proceeding. Conversely, the state court judge held a conference with counsel to consider plaintiff's temporary restraining order and/or preliminary injunction, after which the judge order the defendant to show cause why the injunction should not be issued, which the judge continued at the plaintiff's request. Presumably in response to this state court action, the plaintiff thereafter obtained the relief he sought in that the defendant registered the plaintiff as a securities salesman. The state court proceedings thus have progressed further than the federal proceeding.

Additionally, state court is a better forum for this action. In both the state and federal suits, plaintiff named the State of Louisiana, through the Department of Economic Development, Office of the Louisiana Commissioner of Securities and harry Stansbury, in his capacity as Deputy Commissioner and individually, as defendants. In the Federal action, the Department of Economic Development, Office of the Louisiana Commissioner of Securities and Harry Stansbury in his capacity as Deputy Commissioner moved to dismiss plaintiff's claims against them on grounds that the Eleventh amendment protected them from suit in federal court. In response, plaintiff voluntarily dismissed these defendants from his federal action. The Eleventh Amendment however does not protect these defendants from suit in state court. Although the State enjoys immunity from suit, presumably **these state agencies have waived that privilege and plaintiff may proceed against all defendants in the state court action.**[2] Therefore, the state court accord the plaintiff complete

relief from all defendants, whereas the federal court has only one of the defendants before it.

Most importantly, the law governing this action primarily is state law. Although plaintiff claims defendant violated his federal constitutional rights, plaintiff bases that claim on defendant's failure to abide by the procedural and substantive state securities law. Plaintiff suggests that his claim involves federal issues in that it implicates the NASD investigation, which plaintiff contends involves issues of federal law. NASD has since completed its investigation, the NASD committee held a hearing and plaintiff was found to have violated NASD policy. Plaintiff has appealed this decision to the Securities and Exchange Commission. But, contrary to plaintiff's contention, the NASD investigation and decision are not at issue here, even though the investigation by the Louisiana Securities Commission arose out of the same factual circumstances before NASD.[22] The issue is whether defendant refused to register plaintiff with the Louisiana Securities Commission without providing plaintiff with the opportunity for a hearing. That defendant contends he found plaintiff's application infirm because it failed to disclose a pending investigation by the Louisiana Securities Commission, which happens to pertain to the same facts as those at issue before NASD, does not render the merits of NASD's decision and the subsequent appeal pertinent. Rather, as plaintiff states, "It is the allegations of the commissioner's practice of ignoring the State procedures set out in (Louisiana statutes) providing notice and hearing before denial of registration that is the gravamen of this complaint."

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21 Although I do not have the state court record before me, defendant's memorandum states that the state court has jurisdiction over all defendants, thus suggesting that these defendants have been dismissed from the state court proceeding.

22 Affidavit of Harry Stansbury, 7. Plaintiff offers no evidence to dispute this fact.

Finally, the state forum can protect the federal plaintiff's rights. Unlike Colorado River and Moses Cone, the seminal cases on this type of abstention, where one party filed suit in state court and the opponent filed suit in federal court, in this case plaintiff Amato filed the suit before both the federal and state courts. Although the Fifth Circuit finds a federal court's obligation to exercise its jurisdiction particularly weighty in civil rights cases,[23] a distinction must be made between ordering a plaintiff to exhaust his remedies in state court where has chosen to present his claim first to federal court and ordering a stay of the federal action where the plaintiff clearly has chosen to present his claim first to state court. The first order is generally not available to a federal district court; the second is discretionary with that court.[24]

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23 See, e.g., Signad, Inc. v. City of Sugar Land, 753 F. 2d 1338, 1340 (5th Cir. 1985)

24 Jackson v. Louisiana Dept. of Public Safety, 562 F. Supp. 324, 328 (M.D. La. 1983).

Thus, I find abstention appropriate in this case and I need not address defendant's alternative motion for summary judgment.

IT IS ORDERED that defendant's motion to dismiss is GRANTED.

MOREY L. SEAR
UNITED STATES DISTRICT JUDGE

ADDITIONAL STATUTORY PROVISIONS

FEDERAL STATUTES

42 U.S.C. § 1983

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State of Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States of other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity,or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of columbia shall be considered to be a statute of the District of Columbia.

LOUISIANA STATE STATUTES

La. R.S. 6:101

> A. There is hereby created an office of financial institutions which shall have supervisory and regulatory jurisdiction over all financial institutions and other persons as provided by this Title, and such other jurisdiction as is conferred on the office or commissioner in other legislation.
>
> B. The chief officer of the office of financial institutions shall be the commissioner of financial institutions. The commissioner shall be appointed by the governor, shall be submitted to the Senate for confirmation, and shall have five years of active experience as one of the following:
>
> (1) An accountant with a degree in accounting from an accredited institution;
>
> (2) An attorney licensed to practice law within this state;

(3) A certified licensed agent, broker, or principal who is registered as such pursuant to R.S. 51:701 et seq. or under the Securities and Exchange Act. of 1934; or

(4) An officer of a financial institution.

C. The commissioner shall also serve as commissioner of securities.

D. The commissioner shall receive a salary set and determined by the governor payable monthly on the commissioner's own authorization.

E. The commissioner qualifies by taking and filing the necessary oath of office. He shall serve for a term of four years from the date of his induction and until his successor qualifies.

La. R.S. 9:2798.1

A. As used in this Section, "public entity" means and includes the state and any of its branches, departments, offices, agencies, boards, commissions, instrumentalities, officers, officials, employees, and political subdivisions and the departments, offices, agencies, boards, commissions, instrumentalities, officers, officials, and employees of such political subdivisions.

B. Liability shall not be imposed on public entities or their officers or employees based upon the exercise or performance or the failure to exercise or perform their policy-making or discretionary acts when such acts are within the course and scope of their lawful powers and duties.

C. The provisions of Subsection B of this Section are not applicable:

(1) To acts or omissions which are not reasonably related to the legitimate governmental objective for which the policy-making or discretionary power exists; or

(2) To acts or omissions which constitute criminal, fraudulent, malicious, intentional, willful, outrageous, reckless, or flagrant misconduct.

D. The legislature finds and states that the purpose of this Section is not to reestablish any immunity based on the status of sovereignty but rather to clarify the substantive content and parameters of application of such legislatively created codal articles and laws and also to assist in the implementation of Article II of the Constitution of Louisiana.

La. R.S. 51:710

A. The administration of the provisions of this part shall be vested in the commissioner of financial institutions, who is designated commissioner of securities.

B. The commissioner shall have the authority to administer oaths in and to prescribe forms for all matters arising under this Part. The commissioner shall cooperate with the administrators of the securities laws of other states and of the United States with a view to assisting those administrators in the enforcement of their securities laws and to achieving maximum uniformity in the interpretation of like provisions of the laws administered by them and in the forms which are required to be filed under such laws.

C. The commissioner shall have authority to employ examiners, clerks and stenographers, and other employees as the administration of that portion of this Part vested in him may require. The commissioner shall also have authority to appoint and employ investigators whose salaries shall be fixed by the commissioner with the approval of the governor and who shall have, in any case that there is reason to believe a violation of this part has occurred or is about to occur, the right and power to serve subpoenas and to swear out and execute search warrants and arrest warrants. The commissioner shall designate one of the investigators as chief state investigator and this person shall act at the will of the commissioner to perform any duty required by him as commissioner of financial institutions and commissioner of securities.

D. The commissioner shall have the power to make such rules and regulations from time to time as he may deem necessary and proper for the enforcement of this Part. Such rules and regulations shall be adopted, promulgated and contested as provided in the Administrative Procedure Act.

E. The commissioner or any persons employed by him shall be paid, in addition to their regular compensation, the transportation fare, board, lodging, and other traveling expenses necessarily and actually incurred by each of them in the performance of their duties under this Part.

F. The commissioner shall appoint, with the approval of the governor, a person as deputy commissioner and delegate such of his powers and duties under this Part to such deputy commissioner as he desires.

G. The commissioner shall appoint, with the approval of the governor, an attorney whose salary shall be fixed by the commissioner with the approval of the governor.

H. The commissioner may designate filing depositories for all records required to be filed and maintained under this Part. Such records may be maintained in original form or by means of microfilm, microfiche, microphotographic reproduction, photographic reproduction, word processing, computerization, or other acceptable reproductive methods. The commissioner is further authorized to participate, in whole or in part, in a Central Registration Depository (CRD) or similar system, in cooperation with the National Association of Securities Dealers, Inc. (NASD), otherstates, and the United States, to the extent he deems participation to be in the public interest of this state.